

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MARIO M. MARTINEZ on behalf of himself and all other) persons similarly situated, known and unknown,))) Plaintiff,) v.)) DELKO CONSTRUCTION COMPANY) and DEMETRIOS L. KOZONIS, individually)) Defendants.))	Case No. 08 CV 896 Judge Darrah
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**PLAINTIFF'S MOTION FOR COSTS AND ATTORNEYS' FEES
PURSUANT TO FED. R. CIV. P. 4(d)(5)**

Plaintiff, through his attorneys, pursuant to Federal Rule of Civil Procedure 4(d)(5), move this Court for an award of costs and attorneys' fees incurred as a result of Defendants' failure to return waivers of service of summons properly served on them pursuant to Fed. R. Civ. P. 4(d)(2). In support on this Motion, Plaintiff states as follows:

1. Plaintiff filed his lawsuit against Defendants on February 12, 2008. On February 13, 2008, Plaintiff served the registered agent of Defendant Delko Construction Company and Defendant Demetrios Kozonis, via U.S. Certified Mail, with copies of the Complaint, Notice of Lawsuit, Waiver of Service of Summons, Notice of Attorney's Lien, and self-addressed postage pre-paid envelopes to return the waiver of service of summons to Plaintiff's counsel. See Group Exhibit A, attached hereto.

2. Defendants received the Complaint and Waiver of Service of Summons on February 19, 2008. See Exhibit B, attached hereto.

3. Defendants' executed waivers of service of summons were due to be returned to Plaintiff's counsel on or before March 14, 2008. Defendants failed to return to Plaintiff their executed waivers of service of summons.

4. On March 21, 2008, Plaintiff had the clerk of the Court issue summons for each Defendant. Abode Service was obtained on Defendant Demetrios Kozonis on May 14, 2008, and corporate service was obtained on Defendant Delko Construction Company on May 22, 2008.

5. Defendant Demetrios Kozonis's daughter, Maria Kozonis was personally served with the summons and Complaint on May 14, 2008. Maria Kozonis is 21 years of age and resides at Defendant Demetrios Kozonis's abode. See Group Exhibit C, attached hereto.

6. Defendant Demetrios Kozonis received service of summons under Rule 4(e) of the Federal Rules of Civil Procedure which provides that:

An individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by, (2)(b) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there.

7. Defendant Delko Construction Company's Office Manager Lynn Arnold was personally served with the summons and Complaint on May 22, 2008. See Group Exhibit C, attached hereto.

8. Defendant Delko Construction Company received service of summons under Rule 4(h) of the Federal Rules of Civil Procedure which provides that:

Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States in the manner prescribed by Rule 4(e)(1) for serving an individual; or by delivering a copy of the summons and of

the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant;

9. A defendant may be compelled to pay the Plaintiff's costs of service under the Federal Rules of Civil Procedure Rule 4 provides that:

An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h), and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the Plaintiffs may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons.

Fed. R. Civ. P. Rule 4(d)(2). If a defendant fails to comply with a request to waive service of a summons, "the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown." *Id.* These costs include the cost of service as well as a "reasonable attorney's fee" for a motion to collect costs. Fed. R. Civ. P. Rule 4(d)(5). To trigger a defendant's obligation to pay, a Plaintiff must, (1) send a written notice and waiver request, (2) to the defendant or an officer or agent of the defendant corporation, (3) by first-class mail, including (4) notice of the consequences of failing to comply with the waiver request within 30 days, and (5) a prepaid reply envelope. Fed. R. Civ. P. Rule 4(d)(2)(A-G).

10. Plaintiff complied with Fed. R. Civ. P. Rule 4(d)(2)(A-G). Defendants, however, failed to return their waivers of service of summons. Plaintiff, therefore, is entitled to recover their costs and attorneys' fees in obtaining service on Defendants.

11. Plaintiff seeks to recover the costs incurred in obtaining personal service on Defendants in the amount of \$220.00. See Exhibit C as attached hereto.

12. Plaintiff seeks to recover the cost of attorneys' fees in the amount of \$893.50 See the affidavit of John E. Untereker, supporting the time expended on this matter and his requested hourly rate, attached hereto as Exhibit D.

WHEREFORE, Plaintiff respectfully requests that this motion be granted and Plaintiff be awarded costs and attorneys' fees in the amount of \$1,113.50.

Respectfully submitted,

Dated: June 19, 2008

s/John E. Untereker

JOHN E. UNTEREKER (ARDC# 6290945)
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312-795-9115

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing **Plaintiff's Motion for Costs and Attorneys' Fees Pursuant to Fed. R. Civ. P. 4(d)(5)** was served via electronic mail on June 19, 2008 on:

Iain D. Johnston
Johnston Greene LLC
542 South Dearborn St., Suite 1310
Chicago, IL 60605
(312) 341-3900

s/John E. Untereker
John E. Untereker